STATE OF MICHIGAN

COURT OF APPEALS

KATIE ROBERTSON,

Plaintiff-Appellant,

v

MIKE'S USED CARS,

Defendant-Appellee.

UNPUBLISHED
November 13, 2008

No. 279587
Genesee Circuit Court
LC No. 06-083545-NO

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. Viewed in the light most favorable to plaintiff, the record evidence establishes that defendant undertook a duty of care when its employee advised plaintiff that she could walk in defendant's parking lot. Therefore, I would reverse.

Plaintiff testified at her deposition that on the day of her fall, she drove into defendant's used car lot and stopped behind a blue van that interested her. Plaintiff noticed that the van's hood was raised, and saw a man walking nearby. When plaintiff inquired regarding the van's mileage, the man replied that he could not start the van and had to "go in and get something to start it with." Plaintiff recounted that she then asked, "Well, is it okay if I go down and look at it?" and that the man answered, "Why, sure. Go ahead." As plaintiff walked to the van, she slipped and fell on "black ice."

Frederick Wells, defendant's employee who spoke with plaintiff, recalled that she pulled her vehicle behind a blue van, rolled down her window, and asked if Wells knew the van's mileage. Wells recalled that plaintiff expressed interest in looking at the van. Wells then testified as follows:

> *Q*. And she asked if she could go get out and look at it?
>
> *Wells*. Yes.
>
> *Q*. And what did you tell her?
>
> *Wells*. I said no.
>
> *Q*. Why did you tell her no?

Wells. 'Cause the cars were still locked and I was still trying to get the place cleaned up.

* * *

Q. Why is it that she couldn't walk up and at least walk around the vehicle?

Wells. Because I was cleaning the lot.

Q. Did you have some concern that it was dangerous, or something?

Wells. Yes.

Q. Why were you concerned that it was dangerous?

Wells. Because I was still cleaning it and it was slippery.

Q. Okay. You knew it was slippery?

Wells. Yeah. That's why I was putting salt down.

Wells claimed that during their conversation he held a bag of salt, and further explained,

> I do not want anybody on the lot when I am doing that. I don't want nobody—I know better. That's why I tell people they can't get out or tell people not right now because of the fact that I knew we was cleaning and wanted to get it done.

When evaluating these widely divergent testimonies under MCR 2.116(C)(10), this Court must indulge every reasonable inference in favor of the nonmoving party. *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). This Court must accept that Wells had full awareness of the dangerously slippery condition of defendant's lot, but nevertheless advised plaintiff that she could walk on it to inspect the blue van.

The majority concludes that "the trial court did not err in finding that defendant did not owe plaintiff a duty" of care. *Ante* at 3. I disagree with this conclusion. Defendant owed plaintiff a well-established duty of care, as described in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000):

> The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law.

As the landowner, defendant owed plaintiff a duty to clean the lot, and to "warn of any discovered hazards." Under the circumstances of this case, the law obligated Wells to warn

plaintiff that the lot was dangerously icy, and to advise her against walking on it. Indeed, this is precisely the duty that Wells claims to have fulfilled.

The majority states that "[t]he mere act of granting plaintiff permission to examine defendant's merchandise does not demonstrate that the employee actually rendered a service to plaintiff or that he assumed an obligation to protect her from the hazards posed by any unsafe condition on the premises." *Ante* at 3. Again, I disagree. Wells's testimony demonstrates that he voluntarily undertook to provide plaintiff with important safety information, and thereby assumed a second actionable duty of care, separate from the duty imposed by defendant's status as a landowner.

In *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205, 544 NW2d 727 (1996), this Court drew on firmly established case law to observe that a defendant may face liability when it undertakes a duty that it otherwise does not bear:

> Courts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986); *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990)[, holding ltd in *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993)]; *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991); *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992); *Babula* [*v Robertson*, 212 Mich App 45, 50-51]; 536 NW2d 834 [(1995)].

Baker involved the defendant pharmacy's use of a computer system to "monitor its customers' medication profiles for adverse drug interactions." *Id*. The defendant in *Baker* advertised that its computer system "was designed in part to detect harmful drug interactions." *Id*. Based on these facts, this Court concluded that the defendant pharmacy "voluntarily assumed a duty of care" when it implemented the computer system and advertised its function. *Id*. at 205-206.

In this case, Wells testified that his inspection of the lot revealed it to be icy, and he consequently denied plaintiff permission to walk on it. This testimony establishes a reasonable inference that Wells voluntarily assumed an obligation to advise plaintiff regarding the safety of leaving her car to take a closer look at the blue van. Further examination of Michigan case law lends additional support to plaintiff's claim that Wells's actions created a duty of care.

In *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-402; 418 NW2d 478 (1988), this Court applied the following principles advanced in the Second Restatement of Torts:

> "Negligent Performing of Undertaking to Render Services
>
> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize is necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance on the undertaking." [*Id*., § 323.]

The plaintiffs in *Schanz* owned a building insured by the defendant. *Id*. at 398-399. The defendant retained Commercial Services, Inc., another company, to inspect the building and to estimate its replacement cost. *Id*. at 399. Commercial Services prepared a report containing several serious errors. *Id*. The defendant reviewed the report but failed to detect the errors, and insured the building for an amount well under its actual replacement value. *Id*. at 399-400. After the building burned down, the plaintiffs sued the defendant for the difference, and the jury found in the plaintiffs' favor. *Id*. at 400.

On appeal, the defendant averred that it owed no duty to inspect and appraise the plaintiffs' building. *Id*. The plaintiffs countered that "once defendant undertook to appraise the building for purposes of informing plaintiffs of the required insurance coverage, defendant assumed a duty to use reasonable care in establishing the replacement cost value of the building." *Id*. This Court explained that "the law does not impose a duty on insurers to inspect the premises of their insureds, although such an obligation may be undertaken." *Id*. at 401. This Court held that the trial court properly determined "that defendant owed a duty to plaintiffs to exercise reasonable care in determining the replacement cost coverage under the policy issued to plaintiffs" because material questions of fact existed with respect to whether the defendant undertook the duty described in § 323 of the Restatement. *Id*. at 401-402, 404-405.

In *Buczkowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992), the Supreme Court observed that "[c]ourts take a variety of approaches in determining the existence of a duty, utilizing a wide array of variables in the process." Foreseeability of the risk serves as one component of the "duty" analysis. *Id*. Other considerations are often "more important," including the relationship between the actor and the other party. *Id*. In a footnote, the Supreme Court in *Buczkowski* quoted favorably the following passage from *Rodriguez v Detroit Sportsmen's Congress*, 159 Mich App 265, 270-271; 406 NW2d 207 (1987):

> The determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person . . . . Thus, the determination of whether a duty should be recognized in any individual case is based on a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence and the relationship between the parties. [*Id*. at 102 n 5.]

Here, because plaintiff qualified as an invitee, the parties shared a special relationship. Moreover, the record reflects that Wells voluntarily undertook to advise plaintiff concerning the safety condition of defendant's lot. The risk of injury to plaintiff was indisputably foreseeable, and Wells occupied "a better position to control the safety" of the lot than did plaintiff. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Accurately answering plaintiff's question would have placed no undue burden on Wells. Balancing of the relevant variables in this case, i.e., involved risks, relationships and interests, leads inexorably to the conclusion that defendant, through Wells, owed plaintiff a duty to respond reasonably to plaintiff's inquiry by

advising her of the lot's icy condition, of which Wells had knowledge. Because I believe that under these circumstances the majority errs by failing to recognize an actionable duty, I would reverse.

/s/ Elizabeth L. Gleicher